

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the ) NOTICE OF AMENDMENT,  
amendment of ARM 17.24.201, ) ADOPTION AND REPEAL  
17.24.202, 17.24.203, )  
17.24.206, 17.24.207, )  
17.24.212, 17.24.213, ) (OPENCUT MINING)  
17.24.214, the adoption of )  
new rules I through X, and )  
the repeal of 17.24.204, )  
17.24.205 and 17.24.215 )  
pertaining to opencut mining )

TO: All Concerned Persons

1. On October 16, 2003, the Board of Environmental Review published MAR Notice No. 17-200 regarding a notice of public hearing on the proposed amendment, adoption and repeal of the above-stated rules at page 2190, 2003 Montana Administrative Register, issue number 19.

2. The Board has amended ARM 17.24.201, 17.24.202, 17.24.203, 17.24.206, 17.24.207 and 17.24.214, adopted new rules I (17.24.216), II (17.24.217), VI (17.24.221), VII (17.24.222), and VIII (17.24.223), and repealed ARM 17.24.204, 17.24.205 and 17.24.215 exactly as proposed. The Board has amended ARM 17.24.212 and 17.24.213 and adopted new rules III (17.24.218), IV (17.24.219), V (17.24.220), IX (17.24.224) and X (17.24.225) as proposed, but with the following changes, deleted matter interlined, new matter underlined:

17.24.212 APPROVAL OR DISAPPROVAL OF AN APPLICATION FOR A PERMIT (1) remains as proposed.

(2) The department shall approve a permit application if it determines that:

(a) the application contains the following:

(i) through (iv) remain as proposed.

(v) a completed copy of the landowner consent form; and

(vi) a completed copy of the zoning compliance form; and

(b) through (5) remain as proposed.

17.24.213 AMENDMENT OF PERMITS (1) An operator may apply for an amendment to its permit by submitting an amendment application to the department. Upon receipt of an amendment application and within the time limits provided in 82-4-432(4), MCA, the department shall, if it determines that site inspection is necessary to adequately evaluate the

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application, inspect the proposed site and evaluate the application to determine if the requirements of the Act and this subchapter will be satisfied. If the department determines that a site inspection is necessary and it is unable to evaluate an application because weather or other field conditions prevent an adequate site inspection, the department shall disapprove the application.

(2) The department shall approve an amendment application if it determines that:

(a) the application contains a completed copy of the amendment application form provided by the department, additional bond if necessary, a new landowner consent form if required under ARM 17.24.206(1), a new zoning compliance form if required under 17.24.223, and ~~the proposed~~ plan of operation revisions, if necessary; and

(b) through (4) remain as proposed.

NEW RULE III (17.24.218) PLAN OF OPERATION--SITE PREPARATION, MINING, AND PROCESSING PLANS--AND PERFORMANCE STANDARDS (1) The plan of operation must include the following site preparation, mining, and processing plan commitments and information:

(a) an access road and main permit area boundary markers section, including a statement that the operator has clearly marked on the ground the access road segments to be improved or constructed and the main permit area boundary segments that require marking, and will maintain the markings as required by this rule. Road segments to be improved or constructed must be marked at every corner and along each segment so that the markers are easily visible with the naked eye from one to the next and no more than approximately 300 feet apart. Those portions of the boundary defined by definite topographic changes, natural barriers, or man-made structures, or located in active hayland or cropland, need not be marked. Other boundary segments must be marked at every corner and along each segment so that the markers are easily visible with the naked eye from one to the next and no more than approximately 300 feet apart. Acceptable road and boundary markers include brightly colored, brightly painted, or brightly marked fenceposts, rocks, trees, and other durable objects. A boundary marker must remain functional until the beginning of final reclamation of the area next to that marker;

(b) through (e)(ii) remain as proposed.

(f) a mine material handling section, including:

(i) remains as proposed.

(ii) a description of the types, grades, and ~~estimated~~ quantities of mine material proposed to remain stockpiled, per landowner request, at the conclusion of opencut operations,

and justifications for the quantities based on current and expected demand for the materials. The department shall reject a landowner's request that certain mine materials remain stockpiled if adequate justification is not provided.

(g) through (2) remain as proposed.

NEW RULE IV (17.24.219) PLAN OF OPERATION--RECLAMATION PLAN--AND PERFORMANCE STANDARDS (1) The plan of operation must include the following site reclamation plan commitments and information:

(a) remains as proposed.

(b) a soil and overburden handling section, including:

(i) a statement that the operator will strip soil before other opencut operation disturbances occur; strip, stockpile, and replace soil separately from overburden; strip a minimum of six inches of soil, if available, from accessible facility-level areas; strip all soil from accessible mine-level areas; strip and retain enough overburden, if available, from mine-level areas so that up to an 18-inch thickness of overburden and soil can be replaced on dryland mine-level reclamation, and up to a 36-inch thickness of overburden and soil can be replaced on cropland and irrigated mine-level reclamation; maintain at least a 10-foot buffer stripped of soil and needed overburden along the edges of highwalls; haul soil and overburden directly to areas prepared for resoiling, or stockpile them and protect them from erosion, contamination, compaction, and unnecessary disturbance; at the first seasonal opportunity, shape and seed to an approved perennial species mix the soil and overburden stockpiles that will remain in place for more than ~~one~~ two years; and keep all soil on site and accessible until the approved postmining land uses are assured to the department's satisfaction. Only initial setup activities and soil stockpiling may occur on unstripped areas.

The department may require that more than a six-inch thickness of soil be stripped from facility-level areas in order to protect soil quantity or quality for certain postmining land uses; and

(c) a surface cleanup and grading section, including:

(i) a statement that the operator will retrieve and properly use, stockpile, or dispose of all refuse, surfacing, and spilled materials found on and along access roads and in the main permit area, and leave reclaimed surfaces in a stable condition and with 5:1 or flatter slopes for hayland and cropland, 4:1 or flatter slopes for sandy surfaces, and 3:1 or flatter slopes for other sites and surfaces; leave them graded to drain off-site or concentrate water in low areas; leave them at least three feet above the ordinary water table level for dryland reclamation and at approved depths below the

ordinary water table level for pond reclamation; and blend them into the surrounding topography and drainageways. The applicant may ~~apply for and the department may approve~~ propose the establishment of steeper slopes for certain postmining land uses and the construction of seasonal ponds. The department may require water-table-level monitoring to ensure that appropriate reclaimed surface elevations are established; and

(ii) a description of the locations and designs for special reclamation features such as drainageways, ponds, and building sites. Reclaimed drainageways must be located in their approximate premine locations, and have channel and floodplain dimensions and gradients that approximate premine conditions, unless otherwise approved by the department. and Reclaimed drainageways must connect to undisturbed drainageways in a stable manner.

(d) through (e)(ii) remain as proposed.

(f) a reclamation timeframes section, including:

(i) a statement that the operator will complete all reclamation work on an area no longer needed for opencut operations, or that the operator no longer has the right to use for opencut operations, within one year after the cessation of such operations or termination of such right. If it is not practical for the operator to reclaim a certain area until other areas are also available for reclamation, the operator may ~~request, and the department may approve,~~ propose an alternate reclamation deadline for that area; and

(ii) and (2) remain as proposed.

NEW RULE V (17.24.220) PLAN OF OPERATION--RECLAMATION BOND CALCULATION (1) A proposed reclamation bond calculation must be submitted as part of the plan of operation ~~on a form provided by the department.~~ The bond amount must be based on a reasonable estimate of what it would cost the department to reclaim, in accordance with the plan of operation, the anticipated maximum disturbance during the life of the opencut operation, including equipment mobilization and administrative costs. The department shall review the proposed bond calculation and make a final determination.

(2) remains as proposed.

NEW RULE IX (17.24.224) ASSIGNMENT OF PERMITS (1) remains as proposed.

(2) The department shall approve an assignment application if it determines that:

(a) the application contains ~~a completed copy~~ copies of the ~~assignment~~ application for assignment and assignment forms provided by the department, and necessary revisions to the

permit. The ~~assignment~~ application for assignment form shall include a statement that the applicant assumes responsibility for outstanding permit and site issues;

(b) through (4) remain as proposed.

NEW RULE X (17.24.225) PERMIT COMPLIANCE (1) remains as proposed.

(2) A permittee may allow another person to mine and process mine materials at ~~from~~ the permitted operator's site, only if the permittee retains control over that person's activities and ensures that no violations of the Act, this subchapter, or the permit occur. If the person violates the provisions of the Act, this subchapter, or the permit, the permittee is responsible for the violation, and the department may require abatement pursuant to (1).

(3) remains as proposed.

3. The following comments were received and appear with the Board's responses:

COMMENT 1: How broadly would the proposed definition of "access road" in ARM 17.24.202(1) be interpreted? For example, if material were needed from an off-mine site for constructing a road, would that site need to be included in the permit area? Is this definition basically how access roads are being considered now?

RESPONSE: The definition would be interpreted to include the disturbances that are normally associated with an access road, i.e., cut and fill slopes, ditches, etc. However, if off-site materials were needed for construction of an access road, those disturbed areas would need to be included in the permit area, or permitted as a stand-alone mine site. The proposed definition reflects how the Department is currently including access roads in program administration.

COMMENT 2: ARM 17.24.212(2)(a)(v) and (vi) should be amended by adding the language "a completed copy of the" before the landowner consent form and zoning compliance form. This change is necessary to provide consistency with the language in (2)(a)(ii).

RESPONSE: The Board agrees with the suggested changes and has amended the rule as shown above.

COMMENT 3: In ARM 17.24.213(1) Amendment of Permits, the following is stated: "If the department determines that a site inspection is necessary and it is unable to evaluate an application because weather or other field conditions prevent

an adequate site inspection, the department shall disapprove the application."

My concern is that, in a normal snow year, a pit could not be approved between December and the following April. Would you consider a specific time limit, e.g., 30 days maximum, for weather conditions to hold up a permit?

RESPONSE: The Board agrees that a period of time for the opportunity to do a site inspection before disapproving an application is warranted. Thus, the Board has inserted a reference to 82-4-432, MCA. With this insertion, the same timeframes applicable to initial applications are made applicable to amendment applications.

COMMENT 4: ARM 17.24.213(2)(a) should be amended by deleting the language "the proposed" and adding the language "if necessary." This change is necessary to help clarify that if any revisions have been made to the plan of operation, they must be submitted to the Department with the amendment application.

RESPONSE: The Board agrees with the suggested changes and has amended the rule as shown above.

COMMENT 5: In New Rule III (1)(a), permit boundary markers would need to be placed so that they are visible from one to the next and no more than 300 feet apart. It is recommended that this be changed by deleting the 300-foot requirement and requiring that the markers be placed close enough to each other so that they can be easily seen with the naked eye from one to the other.

RESPONSE: The Board does not concur with complete elimination of the 300-foot requirement. A distance requirement between markers is necessary to insure that each marker is readily visible from the adjacent markers. This is in the interest of operators, as well as the Department, by providing a tool to protect against mining activity outside of the permit area. The Department believes that a distance of 300-feet is adequate to accomplish this. However, to provide some flexibility to the 300-foot requirement, the Board has added the word "approximately" in the appropriate locations. In addition, the Board agrees with the idea of markers being "easily seen with the naked eye," and has added text to that effect accordingly.

COMMENT 6: New Rule III (1)(b)(ii) includes this provision: "A road or portion thereof may remain open for a reasonable postmining use and must be left in a condition suitable for that use ..." Why would the Department determine

what is "reasonable" for the landowner's use? This decision should be the landowner's.

RESPONSE: The Board has the obligation to ensure that proposed postmining land uses meet the requirements of the Opencut Mining Act. The Act requires that land be returned to "productive use." A road proposed to remain open must, therefore, have a legitimate purpose in relation to the use or capability of surrounding lands (mined or unmined) or have an appropriate tie to a landowner's plans for management or economic development. The Board does not view these standards as unwarranted or burdensome to the landowner and believes they are necessary to ensure that the disturbed land is returned to productive use.

COMMENT 7: How will the Department use the information in New Rule III (1)(c)? Mining is dependent on the nature of the resource, and the mining process needs to be flexible. Will the operator be held to his estimate of location and use of equipment? I recommend a statement that a mine plan is required, but there is an understanding that it will change with the resource.

RESPONSE: The Department will use information submitted under this subsection to examine the basic layout and mine plan in relation to, e.g., required soil salvage and stockpiling operations, expected noise levels, hours of operation, and potential hydrologic impacts and the need for hydrologic monitoring and mitigations. All of this would be done to assure that the operation can be conducted in its various aspects in compliance with the Opencut Mining Act and rules. Similarly, compliance with the mining, processing, and hauling subsection is necessary to ensure compliance with the Act and rules. For these reasons, the Board has not included a provision allowing the permittee to deviate from the mine plan. However, the Board recognizes that the plan may need to change because of the nature of the resource. Should a change in the location or use of equipment be necessary, the permittee can apply for a permit amendment. In addition, minor deviations from the plan may not require an amendment. A permittee can consult with the Department to determine whether an amendment is necessary.

COMMENT 8: In reference to New Rule III(1)(f)(ii), the opencut mining staff is taking over what should be the landowner's decision to leave stockpiles of remaining mine material for his use. How can the landowner predict demand for such materials or the needs of his farm or ranch? Expansion of roads on the ranch (which would require use of such materials) may depend on market conditions.

RESPONSE: Section 82-4-423, MCA, requires that land disturbed by open mining operations be reclaimed. Section 82-4-403(13) defines the term "reclamation" as returning the land to productive use. In order to ensure that a gravel stockpile meets this requirement, the Department must make a determination that there is a reasonable possibility that the amount of gravel in the stockpile will be used. For this reason, the Board has adopted the rule as proposed.

COMMENT 9: New Rule III(1)(f)(ii) should be amended by deleting the reference to estimated quantities of mine material. The proposed change is necessary to assist the Department in its administration of the Act and rules by requiring that operators and landowners provide more accurate figures for quantities of mine material. The addition of the two commas is a grammatical housekeeping change.

RESPONSE: The Board agrees with the suggested changes and has amended the rule as shown above.

COMMENT 10: The proposed requirement in New Rule IV(1)(b)(i) that soil stockpiles that will remain in place for more than one year must be seeded would be an unnecessary expense for companies having short-term gravel needs for projects, such as road construction, where the stockpiles would only exist for two to three years before they are used for final reclamation of the mine site. Thus, this seeding requirement should be extended to three years for isolated pits that have limited usage.

RESPONSE: The Board agrees that the time should be extended, but the Board believes that it should be limited to two years for the following reason. After seeding of a stockpile, a vegetative cover that provides any significant protection does not develop for at least a year. Thus, there may be little benefit to seeding a soil stockpile that will be in existence for less than two years. However, a soil stockpile that will be in existence for greater than two years should be seeded to stabilize the surface. The Board has amended the rule as shown above.

COMMENT 11: New Rule IV(1)(c)(i) should be amended by adding the language "propose the establishment of" and delete "apply for and the department may approve." The proposed change is necessary because it is commonly understood that Opencut permitting and operations are subject to Department review and approval or denial; therefore, that phrase is not necessary. The language "the construction of" should be added to provide clarity.



RESPONSE: The Board agrees with the suggested changes and has amended the rule as shown above.

COMMENT 12: In New Rule IV (1)(c)(ii), the following provision occurs: "Reclaimed drainageways must be located in their approximate premine locations, have channel and floodplain dimensions and gradients that approximate premine conditions, and connect to undisturbed drainageways in a stable manner." Some landowners use the gravel excavation as an improvement to their property and may wish to create better habitat. As long as the discharge water leaves the reclaimed area in a manner as stable as before mining, the landowner should be allowed with best management to improve his property. The commentor recommended changing the word "and" to "and/or". Another commentor recommended that the Department have flexibility to allow deviation from drainageway location and channel and floodplain dimension and gradient requirements.

RESPONSE: The Board agrees to revise the text to allow for some flexibility in drainageway location and channel and floodplain dimensions. However, compromising the standard for a stable connection of disturbed and undisturbed drainageways is unacceptable. The Board has amended the rule as shown above.

COMMENT 13: New Rule IV (1)(f)(i) should be amended by deleting the language "request, and the department may approve," and by adding the word "propose." These changes are necessary because it is commonly understood that Opencut permitting and operations are subject to Department review and approval or denial; therefore, that phrase is not necessary. The proposed changes are also necessary to provide consistency and clarity throughout the rules.

RESPONSE: The Board agrees with the suggested changes and has amended the rule as shown above.

COMMENT 14: The title of New Rule V should be amended by adding the word "Calculation." This change is necessary for clarification. ARM 17.24.203 is entitled "Bond Or Other Security," and the title "Reclamation Bond" in New Rule V may cause confusion because it does not accurately reflect the content of the rule.

RESPONSE: The Board agrees with the suggested change and has amended the rule as shown above.

COMMENT 15: In New Rule V(1), the first requirement is: "A proposed reclamation bond calculation must be submitted as part of the plan of operation on a form provided by the Montana Administrative Register 17-200

department." The Department has an incorrect figure for highwall reduction on its current bond form: the \$1.00/cubic yard should instead be in the range of \$0.25-0.30/cubic yard. I would recommend revising the bond form. Also, an operator should have the opportunity to submit his own calculated, site-specific reclamation costs for the purpose of determining the appropriate bond, and not strictly need to use the bond form provided by the Department.

RESPONSE: The Board agrees that the operator should be able to submit his own calculations for the Department's consideration regarding the bond of a proposed mine site, without having to use the Department's bond form. Thus, the rule has been amended to allow for that alternative as shown above.

The statement regarding the incorrect amount for highwall reduction on the currently used bond form is not germane to proposed New Rule V (1); rather, it relates to the specifics of the form itself. The commentor should discuss this matter with the Department outside of this rulemaking proceeding.

COMMENT 16: How would a request for the possible additional information requirements of New Rule VII(1) and (2) relate to the timeframes allowed for approval (30 to 60 days)?

It would be helpful for both the Department and industry if there were clear guidelines on when an application is considered complete and when the 30 to 60 day review period begins.

RESPONSE: An application would not be considered complete until all information required by the Department under this rule was submitted. The Opencut Mining Act does not require the Department to automatically grant an operator approval of an application 30 to 60 days after submittal. Required timelines for review of an application after submittal to the Department and for a decision after an application is determined to be complete are found in 82-4-432(4), MCA. If the Department determines that an application is not complete, the Department must send the applicant a detailed identification of all deficiencies. Such deficiencies would include any information the Department believes would be necessary under New Rule VII. This matter is addressed directly in New Rule I(2) as follows: "If, in its review, the department identifies additional information pursuant to [New Rules III(3), VI(7), and VII(1)] that must be submitted, the application is deficient until that information is submitted." Also in 82-4-432(4), MCA, the Department is obligated to notify an operator when the application is complete, at which point the 30 to 60 day clock for a decision starts.

COMMENT 17: New Rule IX (2)(a) should be amended as follows: "~~a~~ completed ~~copy~~ copies of the ~~assignment~~ application for assignment and assignment forms provided by the department, and necessary revisions to the permit. The ~~assignment~~ application for assignment form shall include a statement that the applicant assumes responsibility for outstanding permit and site issues". The proposed changes are necessary to clarify that the Department requires completed copies of two forms be submitted with an assignment application.

RESPONSE: The Board agrees with the suggested changes and has amended the rule as shown above.

COMMENT 19: New Rule X (2) should be amended as follows: "permittee may allow another person to mine and process mine materials at ~~from~~ the permitted operator's site, only if the permittee retains control over that person's activities and ensures that no violations of the Act, this subchapter, or the permit occur. If the person violates the provisions of the Act, this subchapter, or the permit, the permittee is responsible for the violation, and the department may require abatement pursuant to (1)."

This change is necessary for consistency with the intent of the rule, which is to allow a permittee to control mining activities within the permitted area. The word "from" indicates that control of mining activities and mine material processing could extend to any area where the mine material is taken, which is contrary to the intent of the rule. Use of the word "at" provides proper context with the intent of the rule (within the permit area). The addition of the two commas is a grammatical housekeeping change.

RESPONSE: The Board agrees with the suggested changes and has amended the rule as shown above.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

\_\_\_\_\_  
JOHN F. NORTH  
Rule Reviewer

By: \_\_\_\_\_  
JOSEPH W. RUSSELL, M.P.H.  
Chairman

Certified to the Secretary of State, \_\_\_\_\_,  
2004.